THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
DWAYNE REDMOND,	)	
Employee	)	OEA Matter No. 1601-0033-19
	)	
v.	)	Date of Issuance: August 6, 2020[1]
	)	
D.C. DEPARTMENT OF GENERAL SERVICES,	)	
Agency	)	MICHELLE R. HARRIS, ESQ.
	)	Administrative Judge
	)	

Ann-Kathryn So, Esq., Employee Representative[2]
C. Vaugh Adams, Esq., Agency Representative

INITIAL DECISION[3]

INTRODUCTION AND PROCEDURAL BACKGROUND

On February 15, 2019, Dwayne Redmond ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Department of General Services' ("Agency" or "DGS") decision to terminate him from his position as a Special Police Officer with the Protective Services Division ("PSD"). The effective date of the termination was January 19, 2019. Agency filed its Answer on March 21, 2019. Following an unsuccessful attempt at mediation, this matter was assigned to the undersigned Administrative Judge ("AJ") on June 11, 2019. On June 11, 2019, I issued an Order convening a Prehearing Conference in this matter for July 22, 2019. Both parties appeared for the Prehearing Conferenced as required. A Post Prehearing Conference Order was issued the same day and the parties were required to complete all outstanding discovery as discussed during the Prehearing Conference. Discovery was to be completed by September 6, 2019, and amended Prehearing Statements were due on or before September 18, 2019. Additionally, a Status Conference was scheduled for September 23, 2019. Following the Status Conference, I issued an Order setting a briefing schedule in the matter. Agency's brief was due on or before October 25, 2019; Employee's brief was due on or before November 25, 2019; and Agency's sur-reply brief was due on or before December 16, 2019. Both parties complied with the Order. Upon consideration of the briefs and documents submitted by the parties, I determined that an Evidentiary Hearing was not warranted in this matter. The record is now closed.

[1] This Initial Decision was initially issued on July 2, 2020. However, on August 6, 2020, the undersigned was notified by Employee's counsel that the Notice of Appeal rights were not included with the decision. Due to an administrative error, the Notice of Appeal rights were not included, so this matter is being re-issued.
[2] Talon R. Hurst, Esq., was the attorney of record until a Substitution of Counsel was filed at OEA on May 28, 2020.
[3] This Initial Decision was issued during the District of Columbia COVID-19 State of Emergency.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUES

1. Whether Agency had cause to take adverse action against Employee; and
2. If so, whether the penalty of termination was appropriate under the circumstances and administered in accordance with all applicable laws, rules and regulations.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
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> > That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 628.2 *id.* states:

> The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

Employee was employed by Agency as a Special Police Officer ("SPO") with the Protective Services Division (PSD) at the Department of General Services.[4] In a Final Written Notice dated January 9, 2019, Agency terminated Employee from service pursuant to DPM § 1607.2(n) - *"Inability to carry out assigned duties: Any circumstance that prevents an employee from performing the essential functions of his or her position, and for which no reasonable accommodation can be made, unless eligible for leave protected under the D.C. Family and Medical Leave Act."* The effective date of the termination was January 19, 2019.

Agency's Position

Agency asserts that it had cause to terminate Employee from service. Agency avers that on June 28, 2018, Employee provided documentation to its Human Resources department which indicated that Employee was unable to perform essential functions of his position as a Special Police Officer without accommodation.[5] Agency avers that it engaged Employee in an "interactive ADA process to determine an appropriate accommodation."[6] Agency asserts that because Employee's medical documentation indicated an inability to perform patrol functions, that it sought to identify a vacant position that Employee qualified for. Agency avers that Employee's resume did not meet minimum qualifications for any of the available vacancies at the time.[7] Agency argues that as a SPO, Employee

[4] Employee's Petition for Appeal (February 15, 2019).
[5] Agency's Answer at Page 1 (March 21, 2019)
[6] *Id.*
[7] *Id.*

was required to perform patrol functions while on duty. Agency asserts that patrol is an essential function of all SPOs with or without accommodation.[8] As a result, Agency issued a notice on September 12, 2018, that Employee did not meet the minimum qualifications for vacancies.[9] Agency notes that Employee submitted a written response to the Hearing Officer via email on September 25, 2018 that summarized Agency actions and also detailed his eleven (11) years of services with PSD.[10] Employee's letter also stated that he was willing to return to the position of SPO at the end of September if Agency was not able to identify a vacant position for which he qualified. However, Agency avers that Employee did not provide "medical documentation from his treating physician to indicate his ability to return to duty as an SPO without the previously requested accommodation."[11]

The Hearing Officer issued a written report and recommendation on October 12, 2018. Agency asserts that the Hearing Officer noted that Employee's physician indicated the need for "a stable working environment and remove [sic] of the patrol requirement." Further, the Hearing Officer indicated that given the nature of the position, either reassignment or a job restructuring would be reasonable as an accommodation to Employee's condition.[12] Agency argues that it took steps to identify positions for Employee in accordance with the guidelines of the Americans with Disabilities Act. ("ADA"). Agency avers that "job restructuring under the Americans with Disabilities Act (ADA) involves the reallocation and/or redistribution of *marginal functions* of a position, as opposed to essential functions."[13] Agency notes that this is the reason why the Hearing Officer sustained the proposed separation. Agency asserts that due to an unexpected change in Agency's Director that it requested and received an extension of time on December 28, 2018, from the personnel authority, D.C. Department of Human Resources (DCHR) for removal actions. Agency notes that DCHR "acknowledged that the cause for removal – inability to perform an essential function of his job - had to be addressed whether with an extension or in a renewed termination action."[14] On January 9, 2019, Agency's director, Keith Anderson, sustained the proposed removal, noting that Agency had reasonably attempted to accommodate Employee.

Agency maintains that it followed applicable laws, rules and regulations in its administration of this action. Agency also asserts that in situations where removal is based upon an inability to carry out duties assigned, the DC Government Manual for Accommodating Employees with Disabilities and DPM Chapter 20B "Health" provides guidance regarding reasonable accommodation.[15] Agency argues that its ADA coordinator relied on this guidance to perform an independent review of Employee's accommodation request. After it was determined that an accommodation was not available, Agency avers that it searched for alternative positions at DGS for which Employee could qualify. However, Agency cites that there were no positions available for which Employee was qualified.[16] Further, Agency asserts that DPM 20B Section 2006 "Medical Evaluation Determinations" is the "section pertinent to the evaluation of [Employee's] presentation medication evidence of his inability to perform mobile patrol operations."[17] Agency further asserts that DPM Chapter 20B Section 2006.2 "directs the Agency's duties and responsibilities when confronted with documentation of

[8] *Id.* at Page 2.
[9] Agency's Post Hearing Brief at Page 3 (October 25, 2019).
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.* at Page 4.
[14] *Id.*
[15] *Id.* at Page 5.
[16] *Id.*
[17] *Id.*

permanent disability."[18] Agency avers that it followed the procedure as outlined. Agency states that Employee submitted documentation from his physician which "established that he was incapable of performing the mobile patrol function, an essential function of his job. Agency avers that in response to a medical questionnaire, Dr. Caroline DuPont ("Dr. DuPont") indicated that there were no end dates for the condition that prevented Employee from performing mobile patrol functions and noted in question eight (8) that the nature of Employee condition and its timing was "indefinitely, panic disorder is a chronic condition."[19] Further, Dr. DuPont also noted in question six (6) that:

> "[d]ue to Mr. Redmond's Panic Disorder he requires a stable work environment. Uncertainty about the location, and requirements, of a position cause increased anxiety and recurrence of panic symptoms. A patrol position is contraindicated because of the inherent uncertainty about the location and constantly changing duty requirements. "[20]

Agency argues that the doctor's diagnosis specifically ruled out any participation in the mobile patrol function of the Special Police Officer job. However, Agency notes that the response in question six (6) was in conflict with the doctor's response in question four (4) wherein she states that "there are no restrictions on Mr. Redmond's fitness to perform as a Special Police Officer."[21] Despite this contradiction from Employee's physician, Agency asserts that its ADA officer determined that Employee was unable to perform the essential function of mobile patrol. Further, Agency maintains that Employee was not eligible for light duty as requested in his accommodation, because PSD officers are not offered light duty assignment's for non-workers' compensation related conditions.[22] Agency maintains that it is not required to "restructure a job such that it eliminates the essential functions of the position" when an ADA accommodation has been requested. Consequently, Agency avers that Employee's request for light duty or for a building assignment was a request to eliminate an essential job function of a Grade 6 Special Police Officer-mobile patrol. While Employee alleges that other officers were granted light duty assignments, those assignments were for "temporary conditions or circumstances where a brief period of non-contact status was not only reasonable, but required."[23]

Agency maintains that mobile patrol is an essential function of the duties of a SPO. In determining an essential function, Agency asserts that courts have held that there is "substantial weight to the employers view of job requirements."[24] Agency avers that Employee's job description and duties include the requirement to serve in "both stationary and mobile patrol posts, as needed." Specifically, Employee's position indicated that "[p]atrols designated area by foot or in vehicles inspecting the buildings and adjacent grounds to prevent unauthorized removal of D.C. property and

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[18] *Id.* DPM Chapter 20B- Section 2006.2 provides: Whenever a medical evaluation establishes that an employee is permanently incapable of performing one (1) or more of his or her essential job functions, the personnel authority shall:

a. Collaborate with the employee and the employing agency ADA Coordinators to determine whether a reasonable accommodation can be made that will enable the employee to perform the essential job functions, involving the D.C. Office of Disability Rights for technical assistance and guidance when necessary;
b. If no such reasonable accommodation can be made, work with the employing agency to non-competitively reassign the employee to another position for which the employee qualifies and can perform the essential job functions with or without a reasonable accommodation;
c. If the employee cannot be reasonably accommodated or reassigned to a new position, the personnel authority shall advise the employee of applicable disability and retirement programs, and the program eligibility requirements; and
d. Separate the employee, either through a retirement program or Chapter 16.

[19] Agency's Brief at Page 6 (October 25, 2019).
[20] *Id.*
[21] *Id.*
[22] *Id.* at Page 7.
[23] *Id.*
[24] *Id.* at Page 8. *citing to Ward v. Massachusetts Health Research Inst.*, 209 F.3d 29, 34 (1st Circ. 2000).

access to restricted rooms and areas." Agency determined that mobile patrol was essential and that its properties include parks, schools, office buildings, shelters, storage facilities, swimming pools and parking lots.[25] As a result, Agency maintains that it does not have the "manpower to have persons stationed at each of these facilities 24 hours a day, so it utilizes "roving mobile patrol to monitor and respond to properties as needed and to provide backup to officers in stationary posts." Agency notes that even though Employee was previously assigned to a building before mobile patrol, he was subject to reassignment as needed and even had previously served in mobile patrol in the past. Further, Agency avers that the fact that Employee "was not actually performing on mobile patrol at the time he requested an accommodation that was anything but mobile patrol is not dispositive of whether mobile patrol is an essential function of Special Police Officer."[26] Agency asserts that Employee's inability to perform the function of mobile patrol is what "renders the function essential." Agency argues that if Employee was not able to perform the mobile patrol duty assignments, that it would be "negatively impacted by the need to press other officers into duty to serve this function, suffer additional overtime costs and possible manpower shortages."[27] Agency also asserts that the ability to handle stress on the job is an essential function of the Special Police Officer position. Agency maintains that while Employee's panic disorder is unfortunate, that it is "incompatible with a law enforcement position because it does not permit him to perform an essential function of his position and cannot be accommodated without the elimination of this essential function."

Agency asserts that it followed all applicable laws, rules and regulations to search for other positions for Employee. Agency notes that its ADA coordinator engaged with Employee in this process and searched for position vacancies that Employee might be qualified for. The coordinator was unable to find any such positions based on Employee's resume and the available open positions. Agency argues that "to the extent that there is any dispute as to whether [Employee] qualified for any of the positions that were vacant, the burden is upon employee to prove by a preponderance of evidence that he was qualified for the vacant positions."[28] Accordingly, Agency avers that it had no choice but to propose Employee be separated from service and asserts that its action was administered in accordance with all applicable regulations.

Further, Agency avers that Employee attempts to redefine the meaning of "patrol,"[29] and that Employee wanted to avoid being assigned to a vehicle and traveling to and from buildings for security. Agency asserts that Employee "miraculously recovered" following its notice of proposed separation and after Employee submitted his response to the hearing officer on September 25, 2018. Agency notes that this was never considered as a factor in the decision to remove Employee from service because the "new information was never received by the Hearing Officer or Deciding Official."[30] Agency asserts that the hearing officer received Employee's response on September 25, 2018, and prepared her recommendation on October 12, 2018. Agency notes that the "new diagnosis", indicating that Employee had completely recovered, was mailed on October 10, 2018, according to Dr. Dupont's affidavit, but the hearing officer did not see this document before she issued her report on October 12, 2018.[31] Agency maintains that even if this information had been received, it would not have changed its decision or the outcome because it "fails to address all of the factors in the original medical

[25] *Id.* at Page 8.
[26] *Id.* at Page 9.
[27] *Id.*
[28] Id at Page 10.
[29] Agency's Reply Brief (December 16, 2019).
[30] *Id.* at Page 2.
[31] *Id.*

questionnaire and completely contradicts assertions made by Dr. Dupont in her first response, which stated that the condition (Question 8) was "*indefinitely, Panic Disorder is a chronic condition*."[32] Agency avers that Employee's claim that his doctor did not say he could not perform mobile patrol is "self-serving and disingenuous" because that is exactly what the doctor indicated."[33] Agency further asserts that the doctor's October 2018 letter did not address Question 8 regarding the prognosis and future treatment, and did not provide information to assess Employee's ability to return to work.

Agency also argues that Employee's assertion that it did not follow a PSD internal policy by not putting Employee on light duty pursuant to PSD Policy 606.00 is incorrect. Agency notes that PSD policy does not supersede the DPM or DCHR regulations. Further, Agency notes that the PSD policy "pertains to PSD officers who are ***temporarily*** unable to carry out their regular assignment. (emphasis added)"[34] Agency avers that based on the documentation received, Employee's condition was not temporary in nature. Further, Agency maintains that the relevant policies were DPM Chapter 20B 2006-Medical Evaluation Determinations and the American with Disabilities Act ("ADA"). Agency argues that both policies only require that Agency make reasonable accommodations, not necessarily the accommodation requested by the Employee. Agency also asserts that the "ADA does not require employers to eliminate essential functions of a position to accommodate a disability condition." Agency avers that Employee is asking it to eliminate essential functions and that Employee was appropriately separated from service.

Employee's Position

Employee asserts that Agency's application of the reasonable accommodation procedures did not comply with applicable laws, rules or regulations and that the action of separating him from service was not taken for cause.[35] Employee served as PSD Special Police Officer for Agency for over 11 years. Employee notes that he has also served in different capacities during his tenure at Agency. In January 2017, Agency assigned him to work as a liaison between Agency and the D.C. Homeland Security and Emergency Management Agency ("HSEMA"). Employee started to find issues with infractions that he reported to his supervisors during the course of this assignment.[36] Employee indicated that he would report infractions with Captain Martin Collins and Captain Joseph Brown, but discovered that they were not sign off of the reports, and failed to report them to DGS management. Employee reported issues to both captains in April 2018 and to former director Greer Gillis and the D.C. Office of Inspector General. Employee avers that rather than address the reported issues, PSD management reassigned him to mobile patrol duties and was no longer assigned to work at HSEMA. Employee was scheduled to begin mobile patrol duties on April 29, 2018 and believed that his reassignment was a retaliatory action. Employee asserts that he reported this to Director Gillis and the chief of operations, who advised not to move him to patrol. Employee argues that as a result of Director Gillis' intervention, Captains Collins and Brown created what he thought was a hostile work environment.[37]

Employee asserts that due to severe levels of stress and anxiety and concerns for his safety, he took leave under the Family and Medical Leave Act ("FMLA") on April 27, 2018. Employee also submitted a workers' compensation claim that was denied. Employee submitted a request to DGS for

[32] *Id.* at Page 3.
[33] *Id.*
[34] *Id.* at Page 4.
[35] Employee's Brief (November 25, 2019).
[36] Employee's Brief at Page 4 (November 25, 2019).
[37] *Id.* at Page 5.

reasonable accommodation for reassignment from mobile patrol to an assignment similar to the one he had at HSEMA inside a District building.[38] On June 28, 2018, Employee submitted a medical questionnaire response from his personal doctor, Dr. Caroline Dupont (dated June 26, 2018). Employee notes that Dr. DuPont indicated that he suffered from panic disorder (which he had managed since 1993). Employee asserts that Dr. DuPont said that while the disorder results in increased anxiety, there are no restrictions to his fitness to perform as a Special Police Officer.[39] Employee argues that Dr. DuPont, "never indicated that [Employee] could not perform any of his essential job functions."[40] Employee asserts that Dr. DuPont "identified the recent stress [he] was under and *suggested* that [Employee] not be placed in a patrol position…rather, that he be placed in a building."[41] Employee received a letter dated on July 25, 2018 from the DGS Human Resources Specialist, Brittney Wright, indicating that Employee's "requested accommodation of position restructuring will not enable you to perform the essential functions of the job….As we are unable to reasonably accommodate you in your current position, we will attempt to accommodate you by identifying a vacant position within DGS for which you are qualified."[42] A follow up letter was sent on August 28, 2018 which indicated that "in the event the agency is unable to identify a position, the agency may be required to take steps to separate you from you [sic] current position."[43]

Employee asserts that Agency had limited duty positions and assignments available, but that he was not offered any of these assignments. Employee sent an email to Brittney Wright on September 14, 2018, wherein he stated that he did not believe a job would be found for him at DGS, and that he would be returning to his SPO job at PSD. Employee avers that Brittney Wright responded via email on September 17, 2018, and stated that "in order to return to duty as a Special Police Officer, you will need to provide the agency with updated medical documentation from your treating physician which indicates [sic] physically and mentally fit to perform the essential functions of the position, to include the patrol requirement. If you are able to provide this documentation, the agency will be able to clear you to return in this capacity."[44] Employee argues that no medical provider ever indicated that he was not physically or mentally fit to perform his essential job functions as a Special Police Officer "either before or after he submitted his reasonable accommodation request." Employee also avers that he was not provided a deadline in which to provide the updated medical documentation.[45]

On September 19, 2018, Employee was issued a notice of proposed removal by DGS Human Resources Officer, Walter Graham("Graham"). Employee asserts that Graham's proposed separation was based on its determination that Employee was unable to perform essential job functions. Employee avers that the materials submitted do not say that. Employee notes that the only medical documentation supplied is the medical questionnaire from his doctor, Dr. DuPont which indicated that "there were no restrictions on Mr. Redmond's fitness to perform as a Special Police Officer." Further, Employee argues that Agency did not require him to undergo a fitness for duty examination to determine whether he was incapable of performing his essential duties.[46] Employee also notes that his receipt of the proposed separation also included a document dated September 12, 2018, from Brittney Wright regarding his request for accommodation, wherein she indicates that Employee did not meet the

[38] *Id*. at Page 6.
[39] *Id.*
[40] *Id.* at Page 6.
[41] *Id.*
[42] *Id.* at Page 7.
[43] *Id.*
[44] *Id.* at Page 7 and 8.
[45] *Id*. at Page 8.
[46] I*d.* at Page 9.

minimum requirements for any of the vacant positions at DGS, with the exception of a Special Police Officer position. The letter also noted that because Agency was unable to find a position, that it would take steps to separate him from service. Employee argues that this letter directly contradicts the September 17, 2018 email sent by Ms. Wright which indicated that he could return to work if he provided updated medical documentation.

Employee submitted a response to the hearing officer in this matter on September 25, 2018. Additionally, Employee's doctor emailed the hearing officer a doctor's note on October 10, 201[8].[47] Employee's doctor cited that he was doing well and had "fully recovered from the exacerbation of Panic Disorder and that he was able to resume work responsibilities with no restrictions or accommodations needed."[48] Employee avers that the hearing officer never sent a copy of her recommendation to Employee and that his counsel sent correspondence to inquire, and that they never received a response. Employee avers that he received the hearing officer's recommendation dated October 12, 2018, as an attachment with the Final Agency decision that he received on January 17, 2019.

Employee maintains that Agency failed to follow the appropriate laws, rules and regulations. Employee argues that Agency did not have cause to terminate him from service because it did not show that his conditions prevented him from being able to perform the "core duties" of his job.[49] Employee asserts that agency has to prove by preponderant evidence that he was unable to perform essential functions of his job due to a medical condition. Employee argues that the evidence does not show that he was unable to perform his essential job function. Employee avers that he had dealt with panic disorder for a long time and performed all his duties including patrol without any accommodation since 2007. Further, Employee notes that "assuming arguendo that the patrol function is an essential job function, that Agency failed to show that he was not able to complete this task." Employee asserts that his medical documentation never said he was unable to perform essential job duties. Additionally, Employee cites that while Agency "acknowledges apparent contradictions found in Dr. DuPont's medical questionnaire responses…but then explains that despite this contradictory statement that the ADA officer determined that [Employee] was unable to perform essential function of mobile patrol."[50] Employee avers that the ADA Officer, Brittney Wright, is "not a medical professional and is owed no deference in determining [Employee's] fitness."

Employee maintains that neither the ADA coordinator, the proposing or deciding officials sought clarification from Dr. DuPont regarding her medical questionnaire answers, and noted it was significant that both the proposing official and deciding official noted the contradictions. Employee argues that if any Agency official had contacted Dr. DuPont, she would have clarified that she did not say that Employee was mentally or physically unable to work; rather, she would have said she was "making a suggestion to assist with in recovery of exacerbated panic disorder and explained why working an assignment in a building, rather than working on a patrol position would be more suitable."[51]

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[47] This date is noted in Employee's brief as October 10, 2019, however, Exhibit B, which is an affidavit from Dr. DuPont reflects that she prepared a doctor's note for Employee on October 9, 2018 (#8), and that on "October 10, 2019 at Employee's request she emailed LaShelle Jenkins, the hearing officer (#9). Exhibit C reflects a doctor's note dated October 9, 2018, and Exhibit D reflects an email thread provided from Employee which shows an email thread to the hearing officer dated October 10, 2018. As a result, the undersigned administrative judge notes that the October 10, 2019 date is an inadvertent typographical error.
[48] Employee's Brief at Page 11.
[49] *Id.* at 12.
[50] *Id.* at Page 14.
[51] *Id.* at Page 15.

Employee also argues that Agency conceded that it had not consulted with any other medical provider to determine Employee's fitness to perform essential job functions and did not have him undergo any fitness for duty examinations. Further, Employee indicates that he did submit appropriate and adequate medical documentation that exhibited that he could perform his essential job functions. Employee avers that Agency's action were not in accordance with the D.C. Office of Disability Rights ("ODR"). Employee asserts that ODR requires "reasonable accommodation must be provided to enable a qualified person with a disability to perform the essential functions of the job. This may include changes or adjustments to the work environment, to the manner or circumstances in which the position is customarily performed, or to employment policies."[52] Employee also notes that federal law requires an employer to provide a reasonable accommodation to someone with a known physical or mental limitation who is otherwise qualified, unless the agency can show such an accommodation would cause undue hardship. Employee asserts that agency has not shown that Employee's accommodation request would create undue hardship, but intentionally read the request in the "broadest sense possible to argue that Employee requested not to perform any patrol functions and the agency is not able to remove this essential job function from his required duties."[53] Employee maintains that he "merely asked that his duty assignment and location be modified to allow him to be assigned to a specific government building."

Further, Employee notes that "performing *mobile* patrol functions" is not an essential function of a Special Police Officer (emphasis added in Employee's brief). Employee argues that the "overall task of patrol is an essential function but doing so by mobile vehicle is only a marginal function." Employee states that the Office of Disability Rights provides that "marginal functions are useful responsibilities but are not central to the purpose of the position. These functions can be reassigned without destroying the basic purpose of the position."[54] Consequently, Employee asserts that even though Agency cites to case law that indicates it is not required to restructure a job position, that "mobile patrol" is not by itself an essential function required of all PSD officers.[55] Employee argues that the primary role is to provide law enforcement and security for District government property. Additionally, Employee notes that mobile patrol is a "separate unit within PSD" and that other units, such as his HSEMA assignment do not require employees to perform mobile patrol functions. Employee also asserts that Agency makes an incorrect assertion when it stated that "Dr. DuPont's medical questionnaire responses contained no end dates for the condition that prevented him from performing the mobile patrol function and tries to distinguish between [Employee's] request for a building assignment with that of other employees who are afforded similar assignments for "temporary conditions or circumstances."[56] Employee argues that his "exacerbated Panic Disorder symptoms were temporary, not permanent and resulted from a specific work-related incident in April 2018." Employee asserts that in October 2018, his doctor, reported that he had fully recovered from the exacerbated condition and was high functioning.

Employee also argues that Agency did not follow its own internal procedure. Specifically, Employee cites that PSD Policy 606.00 provides that "temporary limited duty assignments are

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[52] *Id.* at Page 17 citing to D.C. Government Manual for Accommodating Employees with Disabilities at 4. Employee also cites that the ODR instructs that: If an employer reserves certain jobs for light duty, rather than creating light duty jobs as needed, the employer must reassign the employee to a vacant, reserved light duty position at a reasonable accommodation if (1) the employee cannot perform his/her current position because of his/her disability, with or without reasonable accommodation; (2) the employee can perform the light duty job, with or without a reasonable accommodation; and (3) the reassignment would not impose an undue hardship."
[53] *Id*. at Page 18.
[54] *Id.* at Page 19.
[55] *Id.*
[56] *Id.* at Page 20.

available to PSD officers who are injured or ill and temporarily unable to carry out their regular assignment but can perform alternative duty." Employee avers that his condition made him eligible for temporary limited duty at the time he submitted his accommodation request. Accordingly, Employee maintains that he could perform the essential functions of his job and that he was separated from service without cause and that Agency's action was inappropriate and not administered in accordance with all laws, rules and regulations.

ANALYSIS

Whether Agency had cause for Adverse Action

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 reads in pertinent part as follows:

> (a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), *an adverse action for cause that results in removal*, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue. *(Emphasis added).*

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proof by a preponderance of the evidence that the proposed disciplinary action was taken for cause. In the instant matter, in a Final Agency Decision dated January 9, 2019, Agency notified Employee that it was separating him from service for the following causes of action: DPM §1607.2 (n) - "Inability to carry out assigned duties: Any circumstance that prevents an employee from performing the essential functions of his or her position, and for which no reasonable accommodation can be made, unless eligible for leave protected under the D.C. Family and Medical Leave Act." The effective date of the termination was January 19, 2019.

Agency avers that it has cause to terminate Employee from service following its determination that it was unable to reasonably accommodate Employee due to its determination that Employee was unable to perform the essential functions of his job as a Special Police Officer. Agency relied on the District Personnel Manual Chapter 20B -Health and the Americans with Disabilities Act (ADA) provisions in its administration of the instant action. Employee argues that Agency failed to adhere to regulations in its administration of his reasonable accommodation request, and as a result separated him from service without cause.

Reasonable Accommodation Request/Essential Job Duties

Agency argues that it followed the appropriate regulations pursuant to the DPM Chapter 20B and the ADA. Agency asserts that Employee's position as a Special Police Officer included essential duties, including mobile patrol. Agency found that it could not satisfy Employee's request for accommodation through any open vacancies, and that any adjustments to his essential job functions were undue hardship and were not required under the DPM Chapter 20 B or the ADA. Specifically,

Agency relied on the medical questionnaire completed by Employee's personal physician, Dr. Carol DuPont dated June 26, 2018 which indicated that: (1) Employee had a panic disorder that had no end dates, that it was "indefinitely, panic disorder is a chronic condition"; and (2) that Employee needed a "stable work environment and that a "patrol position was contraindicated because of the inherent uncertainty about the location and constantly changing duty requirements." Agency asserts that it tried to find accommodations for Employee by searching for other vacancies, but Employee did not meet the minimum requirements for any open positions and as a result, they had to separate Employee from service due to his inability to complete essential functions of his job as a Special Police Office.

Agency avers that Employee's request for accommodation would require them to change the essential functions of his job and that it was not required to do so under the DPM Chapter 20B or the ADA. Employee argues that his doctor's letter did not say he could not perform his duties as Special Police Officer, and in fact stated that he was not barred from those activities. Further, Employee asserts that Agency separated him from service without allowing him to submit medical documentation to return to his old position as he was directed to do when he advised Agency that he would return to his old positions since no vacancies were available to meet his accommodation request. Employee also noted that a subsequent doctor's note that Agency failed to consider stated that he had fully recovered from the exacerbating panic disorder that he had faced and was able to return to full duty. Employee also avers that "mobile patrol" is not an essential function of the position of Special Police Officer and that Agency would not have undergone any undue hardship to assign him to a position wherein mobile patrol was not required.

DPM Chapter 20B-Health sets forth the procedure by which medical examinations and accommodations are administered in District agencies. This provision relies on ADA recommendations and guidance for the considerations employers must make in dealing with an employee's request for a reasonable accommodation based on a disability. DPM Chapter 20 B Section 2000.3 provides that "medical evaluations are to be made by physicians or practitioners, and determinations regarding essential functions of the job are to be made by supervisors and managers based on the employee's practical day-to-day responsibilities and the employee's position description." Further, DPM Chapter 20 B Section 2006.2 provides:

> **2006.2** Whenever a medical evaluation establishes that an employee is permanently incapable of performing one (1) or more of his or her essential job functions, the personnel authority shall:
>
> a. Collaborate with the employee and the employing agency ADA Coordinators to determine whether a reasonable accommodation can be made that will enable the employee to perform the essential job functions, involving the D.C. Office of Disability Rights for technical assistance and guidance when necessary;
> b. If no such reasonable accommodation can be made, work with the employing agency to non-competitively reassign the employee to another position for which the employee qualifies and can perform the essential job functions with or without a reasonable accommodation;
> c. If the employee cannot be reasonably accommodated or reassigned to a new position, the personnel authority shall advise the employee of applicable disability and retirement programs, and the program eligibility requirements; and
> d. Separate the employee, either through a retirement program or Chapter 16.

In the instant matter, following a period of leave under the Family and Medical Leave Act on April 27, 2018, Employee provided medical documentation on June 28, 2018 following Agency's inquiry as to whether he would like to submit a request for reasonable accommodation.[57] Accordingly, in a letter dated June 19, 2018, Agency's ADA Coordinator, Brittney Wright, acknowledged confirmation of the receipt of the reasonable accommodation request based on a written letter from Employee on June 11, 2018. Further, this letter requested information from Employee's treating physician and provided a medical questionnaire that the physician was to complete. Agency requested the materials requested be returned by June 29, 2018. Employee submitted his documentation on June 28, 2018, and included the responses from his treating physician, Dr. Carol DuPont, which was dated June 26, 2018. On July 25, 2018, Agency sent Employee a determination regarding his request. That letter stated that Agency was in receipt of Employee's responses and those of his physician which "indicated that you have no restrictions on performing as a Special Police Officer; however you require a "stable work environment" with a "patrol position [being] contraindicated because of the inherent uncertainty about the location and constantly changing duty assignments. Accordingly, your physician requested an accommodation in the form of job restructuring in which marginal functions of the position are reallocated and/or redistributed."[58] This letter also iterated that Employee was sent the official job position description which described the essential duties of his position. Agency noted that after a careful review of the documentation submitted by Employee, including his physician's responses, that it determined Employee was unable to perform essential functions of his position and would not be able to provide him with the accommodation requested.

Agency cited that it would attempt to accommodate Employee by identifying a vacant position within DGS for which he was qualified and requested an updated copy of Employee's resume. Employee was not cleared to return to work and was to remain in approve leave status. Agency also advised Employee that should a position not be found, that it may be required to separate Employee from service. Employee and Agency engaged in the search for vacancies. Based on an email provided in the record, Employee and Brittney Wright maintained some communication during this time. In a notice dated September 12, 2018, and included with a Proposed Notice of Separation, Agency made its Final Determination regarding the request for accommodation.

Based on the provisions of DPM Chapter 20B, I find that Agency appropriately followed the procedures as prescribed regarding Employee's reasonable accommodation. In addressing Agency's administration of Employee's first reasonable accommodation request the undersigned looks to Chapter 20B Section 2006.2 of the DPM. Following Employee's request for accommodation, Agency requested medical documentation from Employee's treating physician. Following its review of that documentation and other information supplied by Employee, Agency determined that Employee could not perform the essential duties of his position and sought to find potential vacancies for which Employee might be qualified. Employee argued that Agency did not conduct its own medical evaluation. However, I find that pursuant to Chapter 20B Section 2005.3(a) which provides that "[w]henever the personnel authority directs an employee to undergo a medical evaluation, the personnel authority may direct that the employee*:(a)Be examined by his or her personal physician or practitioner;*" that Agency could rely upon the report provided by Employee's personal physician in making its considerations for reasonable accommodation. Employee was engaged in this process and was advised that if a position was not found that he could be subject to separation.

[57] Employee had previously submitted a claim for workers' compensation while he was still on FMLA leave, but that claim was denied.
[58] Agency's Post Hearing Brief at Tab 1 July 25, 2018 Letter (October 25, 2019).

In determining the essential job functions, Agency relied on the position description for Special Police Officer. Specifically, in the section denoted "major duties," it states that an SPO is responsible for "patrols designated area by foot or in vehicles inspecting the buildings and adjacent grounds to prevent unauthorized removal of D.C. property and access to restricted rooms and areas."[59] Agency avers that mobile patrol is an essential function due to the wide range of properties protected in the District, and that patrol is also utilized to provide back up to officers in stationary posts. Agency argued that even though Employee was formerly assigned in a building, that his position was subject to reassignment and that Employee had served on mobile patrol in the past. Employee argues that while the "overall task of patrol is an essential function," doing so by mobile vehicle is only a marginal function."[60] Employee cites that the D.C. Office of Disability Rights' ("ODR") D.C. Government Manual for Accommodating Employees with Disabilities ("ODR Manual") states that "marginal functions are useful responsibilities, but are not central to the purpose of the position."

The ODR Manual defines essential job functions as "those that are fundamental and central to the purpose of the position….[a] function may be essential because : the position exists to perform that function, there are limited number of employees available who could perform that function and the function is highly specialized."[61] Additionally, this manual notes that factors in determining essential functions include: the employers judgment, position description written before the job was advertised and filled, amount of time employee spends performing the function, functions performed by others in the same or similar classifications, work performed by current and past incumbents, consequences if the position did not perform this function and the number of available employees who could perform this function." The Merit Systems Protection Board (MSPB)[62] has held that:

> "[t]he term "essential functions" means the fundamental job duties of the position, not the marginal functions. 29 C.F.R. § 1630.2(n)(1). Evidence of whether a particular function is essential includes, but is not limited to, the employer's judgment as to which functions are essential; written job descriptions prepared before advertising or interviewing applicants for the job; the amount of time spent on the job performing the function; the consequences of not requiring the incumbent to perform the function; the terms of a collective bargaining agreement; the work experience of past incumbents in the job; and/or the current work experience of incumbents in similar jobs."[63]

The job description for Special Police Officer clearly provides that patrol is integral and one of its major duties in its maintenance of District property. The Merit Systems Protection Board has further held that:

> "[d]etermining whether a particular function is "essential" or not is generally a factual inquiry, reserved for the finder of fact on a case-by-case basis. *Bartee v. Michelin North America, Inc*., 374 F.3d 906, 915 (10th Cir. 2004); *Turner v. Hershey Chocolate U.S*., 440 F.3d 604, 612 (3d Cir. 2006). Absent evidence of discriminatory animus, the Board "generally give[s] substantial weight to the employer's view of job requirements." *Ward v. Massachusetts Health Research Institute, Inc*., 209 F.3d 29, 34 (1st Cir. 2000). "In other words, [the Board's] inquiry into essential functions 'is not intended to second

[59] Agency's Post Hearing Brief at Special Police Officer Position Description (October 25, 2019).
[60] Employee's Brief at Page 19 (November 25, 2019).
[61] *Id* at D.C. Government Manual for Accommodating Employees with Disabilities.
[62] The Merit Systems Protection Board (MSPB) is OEA's federal counterpart and this Office relies upon its decisions for guidance.
[63] *Renayldo Alvara v. Department of Homeland Security*, 116 M.S.P.R 627 (2011).

> guess the employer or to require the employer to lower company standards.'" *Mulloy v. Acushnet Co.*, 460 F.3d 141, 147 (1st Cir. 2006) (quoting *Mason v. Avaya Communications*, Inc., 357 F.3d 1114, 1119 (10th Cir. 2004))."[64]

As previously highlighted, one of the major job duties listed in the position description for Special Police Officer, CS-0083-86, cites that officers' responsibilities include: "patrol designated areas by foot or in vehicles inspecting the buildings and adjacent grounds to prevent unauthorized removal of D.C. property and access to restricted rooms and areas." The undersigned finds that in view of the vast nature of the properties for which Agency is responsible to monitor and protect, that a mobile function of patrol duties would not be marginal in nature and is not a separate function of the overall patrol duties based on the job description. While "mobile patrol" may represent a difference in assignments, in that an officer could be assigned in a more stationary location, based on the job description, it is reasonable to expect that due to the patrol needs of that job, that it would require mobility (vehicle or foot patrol) whether that is a specific assignment or not. Accordingly, I find Agency's determination that patrol/mobile patrol is an essential function of the duties of Special Police Officer, to be a fair assessment of the duties of an SPO.

Further, the undersigned noted that during the process in which Agency was searching for other positions pursuant to Employee's reasonable accommodation request, Employee did not raise an issue with Agency's determination of the documentation he submitted, including his doctor's answers and recommendation as noted in the June 28, 2018 doctor's note. It was not until Agency determined that it was unable to find a vacant position that Employee stated that his doctor's note did not say he was unable to perform duties of a Special Police Officer. That notwithstanding, the undersigned finds that Agency's findings based on the documentation submitted by Employee on June 28, 2018, were enough to establish that Employee's condition was one that required an accommodation and that it appropriately followed the procedure set forth in DPM Chapter 20B Section 2006.2. I further find that upon consideration of Dr. DuPont's questionnaire answers and her recommendation that Employee needed to be in a "stable environment" for a job assignment was sufficient for Agency to rely upon in making its determination, despite her answer that Employee could perform the duties of Special Police Officer. Accordingly, I find that Agency followed all appropriate procedures and guidelines in its administration of the action regarding the Employee's June 28, 2018 request for reasonable accommodation and the subsequent inability to accommodate this request.

Employee's September 2018 Request to Return to SPO Position

There is an outstanding matter regarding Employee's communications with the ADA coordinator. On Friday, September 14, 2018, Employee emailed Agency's ADA coordinator Brittney Wright, and told her that he "didn't think a position would be found and that he would just return to his SPO position." Ms. Wright responded via email on Monday, September 17, 2018, and stated that in order for Employee to return to duty as a SPO that he would need to provide updated medical documentation from his treating physician showing that he was physically and mentally fit to perform the essential functions of the position, to include the patrol requirement. Ms. Wright stated that if Employee was able to provide this information, that Agency would be able to clear him to return to the SPO position. The undersigned finds that Ms. Wright's communication to Employee could reasonably have been presumed to have afforded him another opportunity to return to his position as an SPO.

[64] *Renayldo Alvara v Department of Homeland Security*, 121 M.S.P.R. 453 (2014).

Employee's notice of Proposed Separation was dated September 19, 2018. Employee submitted a written response to the Hearing Officer on September 25, 2018 and noted therein his willingness to return to the SPO position. Employee's response was within the required time frame prescribed in DPM Chapter 16 §1621.3.[65] Agency argues that Employee failed to provide any updated medical documentation at that time. Employee asserts and provided an affidavit from his doctor that updated medical information was sent to Agency on October 10, 2018. Agency avers that this notice came after the Hearing Officer prepared her recommendation and that the Hearing Officer never saw it.[66] Agency also asserts that the deciding official did not consider it because Agency did not receive this note. Agency further asserts that Employee's October 2018 doctor's note suggesting that Employee had "miraculously recovered" from an illness that was determined a few months prior to be indefinite in nature was not considered because it was submitted after Employee's September 25, 2018 response to the Hearing Officer.

It is clear to the undersigned that Agency failed to make considerations after it told Employee he could submit updated information and advised him that if the medical documentation cleared him, Agency would return him to service in the SPO capacity. However, I find that Agency's failure to consider the new information submitted on October 10, 2018 to be an error that does not impact the outcome of the adverse action. Because Employee was afforded an opportunity to submit documentation to the Hearing Officer in this matter, I find that the medical documentation could have been submitted along with his September 25, 2018 response.[67] DPM § 1621.5 provides that an employee's response "shall include the right to present evidence that the employee believes might affect the final decision…this includes written statements of witnesses, affidavits or documents in any other form..." As a result, I find that even though Agency failed to provide an appropriate measure for response to its September 17, 2018 email to Employee, that Employee had an opportunity to present this information in his response. However, Employee's physician sent the information on October 10, 2018. This submission was outside of the prescribed time frame prescribed by DPM §1621.3. Notwithstanding Agency's claim that it never received the October 10, 2018 doctor's note, the undersigned finds that while it would have been *reasonable* for Agency to consider the documentation. However, pursuant to the DPM, there was no requirement that the doctor's note be considered since the submission was outside of the ten (10) day frame for which an Employee has to respond to a proposed notice.

Whether the Penalty was Appropriate

Based on the aforementioned findings, I find that Agency's action was taken for cause, and as such Agency can rely on those charges in its assessment of disciplinary actions against Employee. In determining the appropriateness of an agency's penalty, OEA has relied on *Stokes v. District of Columbia*, 502 A.2d. 1006 (D.C. 1985).[68] According to the Court in *Stokes*, OEA must determine

[65] DPM §1621.1 provides that [w]henever an employee is served a notice of proposed or summary action, he or she may submit a written response to the appropriate official identified in the notice. In the case of removals, the appropriate official shall be a hearing officer appointed pursuant to § 1622. Otherwise, the appropriate official shall be the deciding official. Further, DPM § 1621.3 "Written responses must be received by the appropriate official according to the following schedule: a .For enforced leave actions, within two (2) days of service; b. For corrective actions, within five (5) days of service; and; c**. For adverse actions, within ten (10) days of service."**

[66] Agency's Reply Brief (December 16, 2019).

[67] DPM § 1621.5 provides that an employee's right to respond "shall include the right to present evidence that the employee believes might affect the final decision on the proposed or summary action. Such evidence may include written statements of witnesses, affidavits, or documents or any other form or depiction of information."

[68] *Shairrmaine Chittams v. D.C. Department of Motor Vehicles*, OEA Matter No. 1601-0385-10 (March 22, 2013). *See also Anthony Payne v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for*

whether the penalty was in the range allowed by law, regulation and any applicable Table of Illustrative Actions as prescribed in DPM; whether the penalty is based on a consideration of relevant factors and whether there is a clear error of judgment by agency. Further, "the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office."[69] Therefore when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercise."[70] Agency relied on what it considered relevant factors outlined in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), in reaching its decision to separate Employee from service.[71] Further, Chapter 16 §1607.2 (n) of the Table of Illustrative Actions provides that the appropriate penalty for the first occurrence of an inability to carry out assigned duties" charge, is removal. Consequently, I conclude that Agency did not abuse its discretion in separating Employee from service following its determination of his inability to carry out the assigned duties of his position.

ORDER

Based on the foregoing it is hereby **ORDERED** that Agency's action of separating Employee from service is hereby **UPHELD**.

FOR THE OFFICE:

/s/ Michelle R. Harris
Michelle R. Harris, Esq.
Administrative Judge

Review (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Ernest Taylor v. D.C. Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools*, OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

[69] *See Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Department*, OEA Matter no. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).

[70] *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

[71] *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981). The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

1) the nature and seriousness of the offense, and it's relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
3) the employee's past disciplinary record;
4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties;
6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
7) consistency of the penalty with any applicable agency table of penalties;
8) the notoriety of the offense or its impact upon the reputation of the agency;
9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
10) potential for the employee's rehabilitation;
11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.